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IN THE

Supreme Court of the United States

October Term, 1971
No. 71-849

EDWARD GRIMES,

Petitioner,

vs.

THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA AND THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA,

Respondents.

Response in Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of California

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IN THE

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THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA AND THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA,

Respondents.

Response in Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of California

Respondents respectfully request that the writ of certiorari be denied in the above entitled case. Jurisdiction of the Court is invoked by the petitioner under 28 U.S.C.A. section 1257(3). Respondents contend that this Honorable Court has no jurisdiction in that this case does not present a substantial federal question.

Questions Presented

1. Is the authority of State government to regulate use and control of alcoholic beverages in conjunction with conduct contrary to public morality limited to instances in which obscenity can be proven.

2. Are statutory provisions authorizing the California Department of Alcoholic Beverage Control to suspend or revoke an alcoholic beverage license for conduct which is contrary to public morality, after notice and hearing, unconstitutionally overbroad.

Statutory Provisions Involved

The statutes pertaining to petitioner's contentions are as follows:

United States Constitution, First Amendment;

United States Constitution, Fourteenth Amendment;

California Constitution, Article XX, section 22;

California Business and Professions Code, section 24200(a).

Respondents' argument raises the applicability of the Twenty-First Amendment of the United States Constitution.

History of the Case

Following notice and hearing, a decision of respondent Department of Alcoholic Beverage Control, hereinafter referred to as "the Department," suspended petitioner's alcoholic beverage license for a period of 15 days for a violation of section 24200(a) of the Business and Professions Code of the State of California. Petitioner's license was further suspended for a period of 30 days for failure to comply with conditions of the license in violation of section 23804 of the Business and Professions Code of the State of California. (Pet. Appendix A, Appendix B p. B-7.) The decision of the

Department was affirmed by respondent Alcoholic Beverage Control Appeals Board in a decision dated July 23, 1971. (Pet. Appendix B.)

Petitioner's petitions for writ of review to the California Court of Appeals and petition for hearing to the California Supreme Court were denied on August 23, 1971, and September 22, 1971, respectively.

Factual Statements

The facts upon which the petition in this case is based are set forth on pages B-3 through B-6 of Appendix B to the Petition.

ARGUMENT

I

The Regulation of Conduct Contrary to Public Morality in Connection With the Use of Alcoholic Beverages Constitutes a Substantial Governmental Interest Which Justifies Incidental Limitations on First Amendment Freedoms

The enactment of laws for the protection of the public morality is one of the traditional powers of government which falls within the police power of the State. *Berman v. Parker*, 348 U.S. 26, 32, 75 S. Ct. 98, 99 L. Ed. 27 (1954); *cf. Vallerga v. Dept. Alcoholic Bev. Control*, 53 Cal. 2d 313, 319, 1 Cal. Rptr. 494, 347 P.2d 909 (1959). Petitioner argues that since the conduct in question occurred in the context of nude entertainment, the power of the government to regulate is limited to instances where obscenity can be proven.[1] (Pet. p. 8.) The California Supreme Court has held that nude entertainment is a form of expression which potentially is protected by the First Amendment. *In re Giannini*, 69 Cal. 2d 563, 72 Cal. Rptr. 655, 446 P.2d 535 (1968). Petitioner makes the false assumption that the inquiry concerning governmental power to regulate ceases where the improper conduct occurs in the context of nude entertainment. The *Giannini* decision makes clear that petitioner's analysis is incorrect. The Court stated:

> "Indeed, the concepts of 'potential' and prima facie First Amendment protection are becoming increasingly important in areas other than obscenity law. The restricted and literal approach

[1] Contrary to petitioner's contention, the discipline of petitioner's license was not for presenting nude entertainment.

> to the definition of speech protected by the First Amendment is gradually being replaced by an emphasis on the interest in communication, whether or not promoted by conduct that is precisely speech. The protection of this interest depends upon a balancing process: the weighing of the interest of the state in suppressing or regulating the questioned conduct as against the opposing interest in the interchange of ideas. [Citations.] California's obscenity law here at issue represents merely a particular, albeit well-established, example of this balancing of interests to determine whether First Amendment guarantees apply to a particular example of communication or whether sufficiently important state interests dictate a contrary result." *Supra* at 569, n. 2

The question, then, is to what extent may the traditional power of government to enact legislation for the protection of the public incidentally intrude upon a form of expression which potentially is protected by the First Amendment. The scope of the licensing power of government as it relates to conduct potentially protected by the First Amendment was articulated in *Konigsberg v. State Bar*, 366 U.S. 36, at 49-51, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961), as follows:

> "At the outset we reject the view that freedom of speech and association [citation], as projected by the First and Fourteenth Amendments, are 'absolutes' . . . . Throughout its history this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk. On the one hand, certain forms of speech, or speech in certain contexts, has been considered

> outside the scope of constitutional protection. [Citations.] On the other hand, *general regulatory statutes*, not intended to control the content of speech but *incidentally* limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by *subordinating valid governmental interests*, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved. . . ." (Emphasis added.)

Section 24200(a) of the Business and Professions Code of the State of California is a general regulatory statute which does not attempt to regulate First Amendment conduct. Article XX section 22 of the California Constitution is a state constitutional provision of essentially the same nature. As applied to conduct occurring in the context of nude dancing, the limitations on expression are only incidental to the regulation of nonspeech elements. In the case of *United States v. O'Brien*, 391 U.S. 367, at 376-77, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968), this Court stated as follows:

> "However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when 'speech' and 'nonspeach' elements are combined in the same course of conduct, *a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.* To character-

ize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. . . ." (Emphasis added.)

This Court has only recently affirmed that the police power of the State over intoxicating liquors was extremely broad even before the adoption of the Twenty-First Amendment. *Wisconsin v. Constanineau*, 400 U.S. 433, 436, 91 S. Ct. 507, 27 L. Ed. 2d 515 (1971). The State is justifiably concerned with the evils associated with conduct contrary to public morality in association with the use of alcohol. Recent State court decisions have recognized the validity of this concern. *People v. Lindenbaum*, 11 Cal. App. 3d Supp. 1, 5-6, 90 Cal. Rptr. 340 (1970); *City of Portland v. Derrington*, 253 Ore. 289, 451 P.2d 111 (1968), *cert. den.*, 396 U.S. 901, 90 S. Ct. 212, 24 L. Ed. 2d 177. *See also Hoffman v. Carson*, 250 So. 2d 891 (Fla. July 7, 1971), *cert. den., appeal dismissed*, U.S.S.C. 4 L.W. 3264, 3241.

The existence of the Twenty-First Amendment demonstrates the substantiality of the state's interest and power with regard to use of alcoholic beverages.

> "Having power absolutely to prohibit manufacture, sale, transportation, or possession of intoxicants, was it permissible for [the state] to permit these things only under definitely prescribed conditions? Former opinions here make an affirmative answer imperative. The greater power includes the less. [Citation.] The State may protect her people against evil incident to intoxicants, [citations]; and may exercise large discretion as to means employed." *Ziffrin, Inc. v. Reeves,* 308 U.S. 132 at 138-39, 60 S. Ct. 163, 84 L. Ed. 128 (1939).

Therefore, State government has a valid interest in regulating the nonspeech elements of petitioner's conduct as it occurs in connection with the use of alcoholic beverages, justifying incidental limitations on freedom of expression.

II

The Provisions of the California Business and Professions Code Section 24200(a) and Article XX Section 22 of the California Constitution Authorizing the Department of Alcoholic Beverage Control of the State of California to Suspend or Revoke a License for Conduct Contrary to Public Morality, as Construed by the Courts of the State of California, Are Not Unconstitutionally Overbroad

Petitioner extends that section 24200(a) of the Business and Professions Code of the State of California and Article XX section 22 of the California Constitution lack the precision and "narrow specificity" required of statutes governing the exercise of First Amendment activities.[2] (Pet. p. 8.) Petitioner's contention is

[2]For the sake of convenience, discussion will hereinafter be directed to section 24200(a). All such discussion equally applies

in large measure based on the holding of this Court in *N.A.A.C.P. v. Button,* 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963).

Section 24200(a) on its face is not a statute aimed at conduct involving First Amendment activities. The statute can be and has been applied to a wide variety of conduct. *Harris v. Alcoholic Bev. Con. Appeals Bd.,* 212 Cal. App. 2d 106, 28 Cal. Rptr. 74 (1963) (repeated instances of intoxication of patrons); *Reimel v. Alcoholic Bev. etc. Appeals Bd.,* 252 Cal. App. 2d 520, 60 Cal. Rptr. 641 (1967) (acceptance of gambling bets on licensed premises); *Copeland v. Dept. of Alcoholic Bev. Control,* 241 Cal. App. 2d 186, 50 Cal. Rptr. 452 (1966) (conviction of crime involving moral turpitude); *Adler v. Dept. Alcoholic Bev. Control,* 174 Cal. App. 2d 256, 344 P.2d 336 (1959) (sexual solicitations and touching between employee and patron); *Mercurio v. Dept. Alcoholic etc. Control,* 144 Cal. App. 2d 626, 301 P.2d 474 (1956) (acceptance by waitress of alcoholic beverages from patrons); *Maxwell Cafe v. Dept. Alcoholic Control,* 142 Cal. App. 2d 73, 298 P.2d 64 (1956) (numerous public homosexual acts).

Section 24200(a) is not a censorial statute. Nor is it a statute which licenses freedom of expression. The strict standards of narrow specificity which this Court has required in such cases as *N.A.A.C.P. v. Button, supra,* are applied to statutes falling in the category of regulations of First Amendment activity. *Burton v. Municipal Court,* 68 Cal. 2d 684, 691, 68 Cal. Rptr. 721, 441 P.2d 281 (1968). In contrast to statutes which

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to Article XX section 22 of the California Constitution, since the wording of the provisions for purposes of this case are substantially the same.

censor or license free speech, general regulatory statutes, not on their face regulating speech, are not overbroad or vague even though there may be possible situations in which they may apply to freedom of speech or association. In such instances, the function of courts is to assure that the application of the statute does not infringe upon protected free speech. *United States v. Spock*, 416 F.2d 165, 173 n.20 (1st Cir. 1969).

The argument that a statute which could possibly be applied to protect expression must be voided on its face, carried to its logical conclusion, would require wholesale invalidation of statutes even when the court can adequately assure that the statutes can be properly applied.

> ". . . it is very easy to read a statute to permit some hypothetical violation of civil rights but difficult to draft one which will not be subject to the same infirmity." *Kunz v. New York*, 340 U.S. 290, 304, 71 S. Ct. 312, 95 L. Ed. 280 (1951) (Jackson, J., dissenting).

Consequently, in cases of statutes not on their face regulating expression, the court, where possible, has construed the statute in question as not applying to protected activity and has determined whether constitutionally protected rights are infringed upon in the particular case.[3] *United States v. O'Brien*, 391 U.S. 367, 376, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968) (burn-

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[3]As argued in Argument I, petitioner's conduct was not protected in this case.

ing draft card not constitutionally protected expression); *Adderley v. Florida*, 385 U.S. 39, 41-43, 87 S. Ct. 242, 17 L. Ed. 2d 149 (1966) (state trespass statute not overbroad or vague where aimed at conduct of a limited kind not protected by the First Amendment); *Eastern R.R. Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961) (Sherman Act does not apply to lobbying activities); *United States v. Spock, supra*, (conspiracy law not unconstitutional on its face); *cf. Poulos v. New Hampshire*, 345 U.S. 395, 73 S. Ct. 760, 97 L. Ed. 1105 (1953) (statute licensing First Amendment activity, as construed by state court, did not unduly infringe on freedom of expression).

Respondents thus submit that the better approach to the issue of overbreadth of a general regulatory statute is to determine whether the statute can reasonably be expected to be applied in a manner which does not encroach upon constitutionally protected expression. The California Supreme Court has construed section 24200(a) in a manner which assures its proper application. In determining the issue of overbreadth, this Court takes into account the construction placed upon a state statute by its highest court. *Poulos v. New Hampshire, supra* at 345 U.S. 402.

In *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control*, 2 Cal. 3d 85, 84 Cal. Rptr. 113, 465 P.2d 1 (1970), the California Supreme Court addressed itself to the scope of section 24200(a). The Court stated in that case:

> "There may be cases in which the conduct at issue is so extreme that the Department could conclude that it is per se contrary to *public* morals. By this we mean that it is so vile and its impact upon society is so corrupted, that it can be almost immediately repudiated as being contrary to the standards of morality generally accepted by the community after a proper balance is struck between personal freedom and social restraint. . . ." *Supra* at 2 Cal. 3d 101.
>
> "The constitution formulates the standards for departmental action in terms of public morals. This does not imply that the subjective moral notions of the Department iself necessarily express or reflect actual public morality. Rather, the modifying adjective 'public' necessarily indicates the obligation to apply an objective standard." *Supra* at 2 Cal. 3d 103.

Under the *Boreta* decision, a licensee is not to be denied any privileges under the license until, after notice and hearing, it is affirmatively established that the licensee's conduct falls within the domain properly cognizable by government regulation, justifying thereby the incidental limitation on freedom of expression.

Therefore, section 24200(a) of the California Business and Professions Code is not unconstitutionally overbroad or vague, since the statute is not a regulation of expression and, as construed by the California Supreme Court, can not be applied in a manner which infringes on constitutionally protected expression.

Conclusion

The petition does not present a substantial federal question in that:

1. Petitioner's conduct in this case was not protected by the First Amendment.

2. Section 24200(a) of the Business and Professions Code cannot be applied to constitutionally protected expression.

For these reasons, respondents request that the petition for certiorari be denied.

Respectfully submitted,

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